No. 3033.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EMMA C. LEE and H. LEE, Her Husband,
Plaintiffs in Error,

vs.

I. W. BERNSTEIN, ALEXANDER LEVISON, LILLIE LEVISON, MARY A. OSTROSKI, and NATIONAL SURETY COMPANY, a Corporation,
Defendants in Error.

Reply of Defendant National Surety Co. to Brief of Plaintiff.

HELLER, POWERS & EHRMAN,
Attorneys for National Surety Company, one of the Defendants in Error.

The James H. Barry Co., San Francisco.

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REPLY OF DEFENDANT NATIONAL SURETY CO. TO BRIEF OF PLAINTIFF.

The learned counsel seems to take great comfort out of the argument that there should be a liberal construction of the statute in question. He even goes so far as to ask this Court to hold that it gives a person who has a judgment against him the same relief as if the judgment had been for him.

The reason for the enactment of the California statute which subsequently became Code of Civil Pro-

cedure, Section 355, quoted by Counsel at page 6, must be apparent.

The legislature provided that if a party because of the existence of a judgment in his favor is lulled into inaction pending the time of an appeal and the statute runs against him prior to the decision of the appeal, and the decision is then rendered on the appeal by the upper court against him and that notwithstanding the decision of reversal he still feels that he has a cause of action not covered by the decision, the Code gives him the right to commence another action based upon the same cause of action, within one year after the reversal.

In this case none of the conditions precedent to put the Section into operation exist.

None of the reasons moving the legislature to the enactment of the code section exist here.

Here there was no judgment for plaintiff. Hence only her own neglect prevented her from commencing a new action immediately after the judgment for nonsuit.

There was no appeal by defendant on which plaintiff was respondent.

Moreover the appeal by plaintiff herself to the upper Court did not bring about a judgment of reversal, but the Supreme Court of the State of California sustained and affirmed the decision of the lower Court in favor of defendant and against plaintiff.

The learned judge who passed upon this demurrer in the lower Court filed a written opinion, set forth

at pages 20 to 24 of the Transcript herein which completely states the law as we understand it.

The learned counsel fails to notice the case of *Fay* v. *Costa,* 2 Cal. App., 242, therein shown to completely cover the contention here. We think the reasoning is unanswerable.

At page 11 of the Brief, counsel says the case at bar "though not that literally specified in the statute, differs from it not at all in essence," and naively adds,

> "In the statute-described case, the plaintiff prevailed below but failed above on the defendant's appeal.
>
> "In the case at bar the plaintiff failed below (but not on the merits as shown below), . . . and failed again above. Where is the essential difference between this and a case within the very words of the statute?"

A mind that could follow that argument could also conceive strength in the argument that if to a proposal of marriage a girl said "no" it was not materially different in effect than if she said "yes."

A discussion on that basis is almost puerile.

As a matter of fact, plaintiff could have brought her action in the Federal Court at any time, after she had become a resident of the State of Washington, even during the pendency of the case in the State Court.

The only effect would have been that when the summons from the Federal Court was served upon defendants that the defendants would have entered

a plea in abatement on the ground that the State Court had first obtained jurisdiction of the controversy. The Federal Court, when it should have ascertained that the State Court had first obtained jurisdiction of the controversy, would have made an order postponing further action until there was a final decision of the controversy in the State Court. After the final decision of the State Court was had plaintiff could have obtained an order requiring defendants to plead and the Federal Court would then have proceeded after pleadings on the part of defendants to have heard the case on the merits.

Plaintiff is now attempting to obtain relief in this Court, notwithstanding the fact of her gross laches.

An almost similar state of facts was passed upon by the Supreme Court of the State of California in *People* v. *Campbell,* 110 Cal., 644. At page 49 that Court said:

> "When the present action was commenced, the action of *Prist* vs. *Brown* was pending in the same court, and had not been tried. . . . There was thus presented to the court for determination the precise question involved in this motion, and, if this issue had been tried and found against the plaintiff, the judgment of the court would have been determined by the judgment in the former action."

At page 650 the Court says:

> "When this cause was here upon the former appeal, the appellants urged the reversal of the judg-

ment because of the prior judgment in the case of *Prist* vs. *Brown,* which they had pleaded as a bar to any further litigation of the issue then determined. In holding that this plea of a former judgment was unavailing, for the reason that the judgment had not become final, the court said: 'But while the judgment in *Prist* vs. *Brown,* et al., was not for the reason stated a bar to the cause of action alleged in the cross-complaint, still the pendency of that action would have been a good ground for the continuance of this until the final determination of the former action, or would have been a sufficient basis for an order dismissing the present action upon motion of the plaintiff, notwithstanding the affirmative relief demanded by the defendant Priest in his cross-complaint, and the refusal of the court to have granted either of such motions would perhaps have been erroneous; but no such motion was made by the plaintiff, and the trial proceeded without objection, the plaintiff still insisting upon the judgment in *Prist* vs. *Brown et al.,* as an estoppel and as ground for a judgment in his favor.' In *Harris* v. *Barnhart,* 97 Cal., 546, it was said: 'Where a judgment is effectual as evidence in a plea of former adjudication until the time for an appeal therefrom has expired, the true course of a defendant in such a case would be to plead the pendency of the former action in abatement, until the judgment therein became final, when a supplemental answer averring the proper facts in bar of the action would be in order.'"

We cannot follow counsel in his argument based upon *Kenny* v. *Parks,* 137 Cal., 530.

In that case the plaintiff began suit against the defendants because of certain fraudulent transactions

with reference to the transfer of certain real property and the plaintiff recovered judgment against the defendants and was put in possession of the lands.

After an appeal was taken there was a reversal of the judgment by the Supreme Court and another suit, to-wit: that which was the subject of the decision referred to by counsel, was commenced within a year of the judgment of the reversal.

The only point decided there was that although the new suit was based on a slightly different statement of facts, to-wit: that the depositary of the deeds in the first case was a third party, and in the second case, the grantee himself, the Court held that the principle was not affected.

Counsel has referred to decisions in several states other than California which are based upon the peculiar wording of the several statutes of those states.

Then at page 11 he says:

> "The savings provisos of these and other states vary much in phrase—some of them are identical in wording with the California statute, some are its substantial equivalent, some are much broader in their express terms; but not one of them is nearly so broad in its literal text as the scope given to it by judicial interpretation."

It would be much more to the point if counsel would cite some case where the Court held that the decision for the plaintiff will have the same effect

as a decision for the defendant from some state that has a statute of limitation that is identical with that in California.

The nearest counsel has come to a case squinting at any assistance to his theory is the case of *Pittsburg etc. Ry. Co.* v. *Bemis,* 59 N. E., 745.

This is a case from Ohio and the judge rendering the opinion quotes Sec. 4991, Revised Statutes of that state, as follows:

> "If, in an action commenced, or attempted to be commenced, in due time, a judgment for the plaintiff be reversed, *or if the plaintiff fail otherwise than upon the merits,* and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff . . . may commence a new action within one year after such date."

It will be observed that the Ohio statute adds an entirely new and separate provision which is entirely absent from the California statute, viz., if the plaintiff fail otherwise than upon the merits.

There is no such provision in the laws of the State of California.

So in the case of *Atlanta K. & N. Ry. Co.* v. *Wilson,* 47 S. E., 366.

The decision there turns upon the peculiar wording of the Georgia statute. The Court holds that section 3786 of the Civil Code, 1895 Georgia, is remedial and to be liberally construed so as to preserve the right to renew the cause of action set out

in a previous suit wherever the same has been disposed of on any ground other than one affecting its merits.

This section, No. 3786, provides as follows:

> "If a plaintiff shall be nonsuited or shall discontinue or dismiss his case and shall recommence within six months, such renewed case shall stand upon the same footing, as to limitation, with the original case; but this privilege of dismissal and renewal shall be exercised only once under this clause."

It will be observed that an entirely new proposition not contained in the laws of the State of California, viz: if a plaintiff shall be nonsuited, is the basis on which this decision rests.

Similarly the case of *Roundtree* v. *Key,* 71 Georgia, 214, turns upon the language of the same Georgia Code.

Similarly in the case of *Robinson* v. *Merchants' & Miners' Transp. Co.,* 19 Atl., 113.

This turned upon the peculiar provisions of a Rhode Island statute, to-wit:

> "Pub. St. R. I. c. 205, Sec. 8—If any action duly commenced within the time limited and allowed therefor in and by this chapter, shall be abated, or othewise avoided or defeated, by the death of any party thereto . . . the plaintiff may commence a new action for the same cause at any time within one (1) year after the abatement or other determination of the original suit."

The Court says, at page 114:

> "The obvious purpose of the section is to enable a plaintiff to bring an action after the general period of limitation has expired, provided he has duly commenced any action for the same cause within said period, and lost the benefit of it in either of the modes described, and the section, being remedial, should be liberally construed in furtherance of its purpose."

It will be observed that there is an entirely different and separate addition to the relief provided for in the California statute.

The case of *Phelps & Bell* v. *Nathan Wood,* 9 Ver., 399, was one where plaintiff had brought suit before a justice of the peace within time.

The justice of the peace continued the cause once and was absent the second time appointed for trial and under the peculiar provisions of the Vermont law there was no provision for the cause being continued in the absence of the justice except on the day set for trial.

Under those circumstances the Court held that the plaintiff had a right to commence another suit, adding:

> "If the plaintiffs had discontinued their own suit or voluntarily become nonsuited therein, it is evident that they could not rely upon that suit to prevent the operation of the Statute of Limitations."

This again turns upon the peculiar wording of the

Vermont statute which was not similar to the California statute.

Again in the Tennessee case of *Thomas* v. *Pointer,* 14 Lea, 345, the Court quotes the code of that state as saying,

> "that if an action be commenced within the time limited, but the judgment or decree is rendered against plaintiff, upon any ground not concluding his right of action . . . the plaintiff . . . may from time to time commence a new action within one year after reversal or arrest."

So in the case of *Huntington* v. *Brinckerhoff,* 10 Wendell, 276, at page 281, the Court sets forth the provisions of the revised statute of New York at the time the pleadings were framed, and then says:

> "The Revised Laws, 1 R. L., 186, Sec. 5, after limiting certain actions to be brought within given periods, contain a provision that if in any of the actions specified, judgment shall be given for the plaintiff and the same be reversed for error, or if after a verdict for the plaintiff the judgment shall be arrested, or if in a suit by original, defendant be outlawed and such outlawry afterwards reversed the plaintiff . . . may commence a new action, from time to time within one year next after such judgment be reversed, arrested or outlawry reversed, and not after."

The case turns upon whether executors could commence a suit after the death of their testator, and the Court holds the better opinion is that where the six years have run at the death of the plaintiff, the suit

could be commenced by the executor or administrator within a year, in analogy to the statute whence the rule is derived.

So in the case of *Barker* v. *Millard,* 16 Wendell, 572, the Court quotes the same statute and then says:

> "Where the action is brought within six years and the plaintiff dies before judgment, his executor or administrator may have a new action within the equity of the first proviso."

In the case of *Cox* v. *Strickland,* 47 S. E., 912, at page 915, the Court held that under the Georgia statute,

> "if the suit was disposed of on any matter not concluding the merits of the cause of action, or any of the causes of action asserted in the proceeding by one party against the other, it might thereafter be seasonably renewed in the proper forum, in proper form, against any of the proper and all of the necessary parties therein. Some of the statutes on this subject are much more narrow than that contained in the Civil Code of 1895, Sec. 3786. Some limit it to cases in which there has been an involuntary nonsuit; others to dismissal by the court for some matter of form not involving the merits; others to dismissal as the result of a reversal; others to cases where the judgment in favor of the plaintiff has been arrested or set aside,"

and then adds:

> "But our statute, construed in the light of the acts from which it was codified, is very broad. It can-

not mean that the form and parties to the new cause shall in all respects be identical with the former."

It is very evident that if Judge Lamar had been passing upon a code provision similar to our Sec. 355, he would have decided that case very differently.

This same Georgia Court interpreting Sec. 2932 of the Code, which at the time of the decision was in the same words and effect as Section 3786, has held that this section of the Code did not apply where the first action was commenced in the Federal Court and renewal was thereafter petitioned for in the State Court,

Constitutional Pub. Co. v. *De Laughter,* 21 S. E., 1000,

and also that where a suit had been removed from a State Court to the Circuit Court of the United States, that the jurisdiction of the State Court ceased and after a nonsuit in the Federal Court the case could not be renewed in the State Court within six months.

Cox v. *The East Tennessee, Virginia and Georgia Railroad,* 68 Geo., 446.

The point with reference to the suit being barred because plaintiff was a married woman and her husband was a necessary party under Subdivision 4 of Section 352, is almost impossible to understand.

Plaintiff's husband joined with her in this action and joined with her in the original action in the Superior Court of the State of California. Mrs. Lee and her husband, both having had their day in the California State Court, cannot now be heard to claim that Mrs. Lee was under disability where her husband was a necessary party with her in commencing the action.

Had she alleged that it was impossible for her to commence the action because her husband would not join with her, there might have been something to be discussed, but in view of the condition of the pleadings at the present time we feel that the argument is a moot question which need not be discussed at this time.

In a case of this character a motion for nonsuit can of course only be made after plaintiffs have set forth their full case.

The reasons for allowing the case to be tried the second time do not obtain in such cases as they do in suits for the payment of money where the reason for the statute of limitations is a presumption that the claim has been paid where suit is not brought in a certain time.

We respectfully submit that there is no reason why

any law should be construed to assist a plaintiff in an action like this beyond the time given by the law where there has been a trial and motion for nonsuit and a review of the testimony in the upper Court.

The plaintiffs having elected to commence a suit in the State Court and having neglected to keep alive their alleged cause of action by concurrent suit in the Federal Courts they should certainly not be gainers by their own negligence.

The demurrer was properly sustained.

Respectfully submitted.

HELLER, POWERS & EHRMAN,
Attorneys for National Surety Company, one of the Defendants in Error.